Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-6949

ROBERT DUNN,
Petitioner,

—vs.—

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 20, 1978
CERTIORARI GRANTED DECEMBER 11, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-6949

ROBERT DUNN,

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—*vs.*—

UNITED STATES OF AMERICA,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

1976

12-15 INDICTMENT ($5,000-10%)
Warrant of Arrest issued.

1977

2-11 ARRAIGNMENT (SGF) Deft. enters plea of NOT GUILTY to Cts. 1, 2, 3 . . . Case be set for trial 4-11-77 . . . Deft. has 15 days to file motions . . . Bond cont'd. eod 2-14-77.

2-23 Trial set for wk of 4-11-77.

3-10 MOTION of Deft. for Bill of Particulars.

**3-16 Minute Order (SGF) Deft's Motion for Bill of Particulars is set for hearing 3-25-77 at 10 a.m. . . . Govt. to file answer on or before 3-25-77. c.o.m.

3-18 Govt's Response to Motion for Bill of Particulars.

3-22 Memo in Support of Motion for Bill of Particulars.

3-25 HEARING (SGF) Oral argument waived . . . Ordered: Motion for Bill of Particulars is denied . . . Bond cont'd . . . Recess. eod 3-28-77.

4-13 Trial Brief of Deft.
MOTION of Deft. for Judgment of Acquittal.

**4-11 TRIAL TO JURY (SGF) 1st Day . . . Jurors selected —excused to 4-13-77

4-13 TRIAL TO JURY (SGF) 2nd day . . . Jurors sworn to try . . . Witnesses . . . Exhibits . . . Closing arguments . . . Court instructs jury . . . Jury commences deliberations . . . Court in recess to 4-14-77. eod 4-19-77

RELEVANT DOCKET ENTRIES—CONTINUED

1977

4-14 TRIAL TO JURY (SGF) 3rd Day . . . Jury continues deliberations . . . Jury returns verdict of NOT GUILTY to Ct. 1, GUILTY to Ct. 2, GUILTY to Ct. 3, GUILTY to Ct. 4, NOT GUILTY to Ct. 5 . . . Motions to be filed by 4-25-77; reply due by 5-2-77 . . . Bond cont. eod 4-19-77

5-6 HEARING (SGF) Ordered: Hearing on Deft's Motion for Acquittal filed during trial set for special hearing on 5-23-77 at 9 a.m. eod 5-6-77.

5-13 Signed (SGF) Order re: Govt. has until 5 p.m. 5-16-77 to file answer & memo of authorities to Deft's Motion for Acquittal & pre-trial brief . . . Deft. has until 5 p.m. 5-19-77 to file any response. eod 5-17-77 c.o.m.

5-23 HEARING (SGF) Re: Motion for Judgment of Acquittal . . . Matter submitted on briefs . . . Ordered: Motion is denied . . . Oral findings of fact & conclusions of law given from bench . . . Recess. eod 5-24-77

5-23 SENTENCING (SGF) Deft. be impr. 5 yrs. as to Cts. 2, 3, 4; Cts. 3 & 4 to run conc. w/Ct. 2 . . . Deft. advised of right to appeal . . . Bond cont'd pending appeal . . . Transcript for appeal to be pd. for by govt . . . Deft. to report to Prob. Office on the 1st & 15th of every mo. while on bond pending appeal, advising them of current address & place of employment . . . eod 5-24-77

Signed (SGF) Judgment and Commitment. eod 5-24-77

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROBERT DUNN, DEFENDANT

INDICTMENT—Filed Dec. 15, 1976

18 USC § 1623

COUNT I

The Grand Jury charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count I, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether ROBERT DUNN had ever assisted Phillip Musgrave in smuggling controlled substances into the Colorado State Penitentiary through Steve and Debbie Strammel.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you assist him (Phillip Musgrave) in getting stuff smuggled into the penitentiary?

A. Yes, sir, once.

Q. Was that with the Strammels?
A. Yes, sir.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. What about Steve Stramel. Did you ever know Steve Stramel?
A. Uh not knowing, by being introduced to him. I seen him at one time.
Q. Where did you see him?
A. Uh him and a girl Debra, Debbie uh came up to see Phillip and I seen him across the visiting room. I was visiting with some friends of mine that came up from Denver and I just seen him from a distance. I . . . I couldn't even . . . I doubt if I could recognize him.
Q. You never had any conversation with either Steve . . .
A. No sir.
Q. . . . or his girlfriend or wife, Debbie?
A. No.
Q. Did you ever smuggle in drugs to the institution from Steve and Debbie?
A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count I were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT II

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make

a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count II, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Phillip Musgrave ever gave ROBERT DUNN a controlled substance while both were incarcerated in the Colorado State Penitentiary.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did he (Phillip Musgrave) have drugs there in the penitentiary?
A. All the time.
Q. Did you work with him or for him in the penitentiary?
A. I was a gopher boy; I went for pop, commensary and held his stash for him.
Q. What did you get in return?
A. A fair amount of speed every time he'd cop.
Q. Every time he had some, he'd give you some?
A. Oh, yes, sir. I don't know whether it was because he liked me, because he wanted to do it, or because he was paranoid if he didn't do it, something bad would happen at first.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. During the time that you were in the penitentiary uh did Phillip Musgrave ever give you any drugs of any sort?
A. No sir, he didn't.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count II were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT III

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count III in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether ROBERT DUNN made telephone calls to Kate Blehm regarding drugs from the Colorado State Penitentiary.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you make some calls for Musgrave to Kate?
A. Yes, sir, I did.
Q. Did he give you the phone number?
A. Yes, sir, both of them.
Q. He gave you two phone numbers?
A. One where she worked at the—881-2273, at the Rustic Resort and at home, 881-2278, and that's in Belleview. I may have them numbers mixed up, but I'm not sure. It's been quite a while since I called the number.
Q. So you would call and give messages to Kate also in addition to Musgrave?
A. Yes.

Q. Did you have any code names you were supposed to use?
A. He was one, Jimmy Heath was two and I was three.
Q. Did you talk about speed or did you use another word?
A. Bull shit, excuse me.
Q. That was the code name for the speed?
A. Yes, sir.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976 while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. Now who is Kate?
A. Kate Blehm.
Q. And who was she?
A. Phil's uh girl.
Q. Alright.
A. Uh he asked me if I would call her and ask . . . and have her bring up a book, you know, like a tarot card book that uh shows you how to read 'em and how to uh understand 'em. And uh to be sure and come up and see him. Uh that was it.
Q. Was there any mention or any code with reference to drugs in any conversation with Kate Blehm?
A. No sir.
Q. Did Phillip tell you what to say to her insofar as code which might involve speed or the smuggling of drugs into the institution?
A. No sir. All he said was see . . . tell her to get me uh a tarot card book and to be sure and come up to see him.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count III were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT IV

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count IV, in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Phillip Musgrave ever gave ROBERT DUNN a list of chemicals useful in the manufacture of methamphetamine.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

> Q. During February of '76, did you see Musgrave again and find out—did he say that he still wanted any of those chemicals?
>
> A. Yes. I was living out on West 58th Avenue in Arvada, 14500 West 58th. It was a 10-acre farm that me and a friend of mine was renting—me and a friend of mine and his wife, and it was pretty excluded, had a barn. And the guy that I was living with, he worked out at Continental Oil also and he came into town looking for me on a Monday and I had just had some teeth pulled and I didn't feel like messing with anybody so I just started spacing him out—just not meeting when I was supposed to, and he chased me for three and a half days until he finally caught up with me.
>
> Q. What did he want when he caught up with you?

> A. Propenyl, methylamine. He wrote out on an envelope—a big manilla envelope that I still have—all the chemicals that are needed.
>
> Q. Musgrave wrote this out on the envelope?
>
> A. Yes, sir.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976 while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

> Q. Did you ever at any time ever get a list of chemicals from Mr. Musgrave for any purpose?
>
> A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count IV were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

COUNT V

The Grand Jury further charges that:

1. On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count V in violation of Title 18, United States Code, Section 1623.

2. At the time and place aforesaid, the Grand Jury was conducting an investigation to determine whether there were violations of the federal conspiracy and drug abuse prevention and control statutes.

3. It was a matter material to this investigation to determine whether Edward Perkins had ever delivered methamphetamine to ROBERT DUNN.

4. At the time and place aforesaid, ROBERT DUNN, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows:

Q. Did you have a meeting with Perkins some time?

A. He came down one night. Cebe sent me down a half ounce as a bonus for the girl I got him, that Kris.

Q. Was this in November or December of '75?

A. Yeah.

Q. Okay.

A. And Eddie Perkins come down and delivered it.

Q. Delivered it to you?

A. No, he come in kind of funny. He come in the front door of the apartment, said it was on the outside window sill of the bedroom and it was one of these—it was a basement where you couldn't roll the windows and they were roll-type windows and you couldn't roll them all the way out and I couldn't get my arm out there and Charlotte, my girl at the time, couldn't get her arm out there, so he stuck his arm out there and got it.

Q. And gave it to you?

A. Yes, sir, and then he did about six 180 degree turns and out the door.

5. At a time subsequent to ROBERT DUNN's declaration as aforesaid, that is, on September 30, 1976, while under oath as a witness in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, ROBERT DUNN did knowingly declare with respect to the aforesaid material matter as follows:

Q. You've met Eddie Perkins once or twice?

A. Uh twice.

Q. And how long did each of those meetings or uh social events take place?

A. With Mr. Perkins the first time, it was about three minutes. In other words, he came in and delivered a message you know, Phillip was in town and if I wanted to see and meet him for dinner. And the second time was at uh Aurora, a friend of mine's house. Went out to uh . . . I went out to sell a guy some tires and Eddie was there. Uh

somethin' happened to his car. Oh, his wife or his ex-wife took his car and he didn't have any transportation. And he was waitin' for a ride and I . . . that was no more than hello and goodbye.

Q. Did you ever have any business dealings of any sort with Mr. Perkins?

A. No sir.

Q. Did you ever buy any speed from him?

A. No, but I'd sure like to sell him some.

Q. Did you sell him any?

A. No.

Q. Alright. Did you ever discuss speed with Mr. Perkins?

A. No sir.

6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs four (4) and five (5) of this Count V were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

A TRUE BILL:

/s/ [Illegible]
Foreman

JAMES L. TREECE
United States Attorney

BY: /s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

[Title Omitted in Printing]

MOTION FOR BILL OF PARTICULARS—
Filed March 10, 1977

COMES NOW the defendant, by and through his counsel, Federal Public Defender, Daniel J. Sears, and respectfully moves this Court for a Bill of Particulars as to the following matters:

1. In paragraphs 4 and 5 of each respective count, the indictment in the above case alleges that the defendant made certain declarations before the Grand Jury and on September 30, 1976, in a proceeding ancillary to *United States* v. *Musgrave, et al.*, Criminal Case No. 76-CR-155, respectively. In paragraph 6 of each respective count, the indictment alleges that the "aforesaid declarations . . . as set forth in paragraphs four (4) and five (5) . . . were inconsistent to the degree that one of said declarations was false and known by him to be false when made.

The defendant requests that the government file a Bill of Particulars setting out which of the declarations in paragraphs 4 and 5 of each count are inconsistent with each other, or, in the alternative, which of the statements alleged was false and known by the defendant to be false when made.

As grounds therefore, the defendant states:

1. That each count charges a violation of Title 18, United States Code, Section 1623 without alleging the subsection under which he is charged. The indictment alleges the language of an inconsistent declarations violation in the language of subsection (c) yet alleges that one of said declarations was false without specifying which it intends to prove is false.

2. The defendant requires such information to adequately prepare a defense.

WHEREFORE, the defendant requests that a Bill of Particulars be filed by the government specifying which declarations it deems inconsistent in each count, or in the alternative, which declarations it charges were false and known to the defendant to be false when made.

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

[Title Omitted in Printing]

MEMORANDUM IN SUPPORT OF
MOTION FOR BILL OF PARTICULARS—
Filed March 22, 1977

It is well held that a Motion for Bill of Particulars is addressed to the sound discretion of the trial court. *United States* v. *Hedges*, 458 F.2d 188, 191 (10th Cir. 1972). And a decision by the trial court will not be disturbed absent an abuse of discretion such that an accused was denied information which would have more specifically defined the offense charged. *United States* v. *Gleeson*, 411 F.2d 1091 (10th Cir. 1969).

The indictment, on its face, must be sufficient to allow a defendant to adequately prepare a defense. If it is not, then a bill of particulars should fulfill that function. *Tritt* v. *United States*, 421 F.2d 928, 950 (10th Cir. 1970).

It is no answer to a denial of a bill of particulars to say that a defendant knew what he did. *King* v. *United States*, 402 F.2d 289, 292 (10th Cir. 1968).

The defendant in the present case submits that in order to effectively prepare for trial, he must know the specific allegations of inconsistent declarations he must meet, or, in the alternative, which declarations the government contends are false. What must be met as a matter of proof to defend against charges that declarations made on two separate occasions are inconsistent with each other is substantially different than preparing to prove the truth of alleged false declarations. And where the declarations alleged to be inconsistent or false are several within a single count of an indictment, the defendant must be apprised of which particular statements are alleged to be inconsistent with each other, or, in the alternative, which were allegedly false when made.

If, in an obstruction case, the defendant is entitled to know the identities of jurors or acquaintances through whom influence or intimidation was alleged to have been transmitted, certainly statements alleged to be inconsistent, or, in the alternative, false in a perjury case should be set out to the defendant. *Cefalu* v. *United States*, 234 F.2d 522, 525 (10th Cir. 1956).

The government in its Response to Motion for Bill of Particulars misconstrues the defendant's request. The defendant agrees that only one offense is defined under 18 U.S.C. § 1623 with alternative ways of violating the statute. The defendant submits, however, that he is entitled to know under which theory the government expects to proceed. The language of the indictment closely follows the phraseology of 18 U.S.C. § 1623(c) but subsection "c" is not cited. The defendant will be greatly prejudiced if it prepared a defense of an inconsistent declaration theory and discovers, at trial, that the government expects to prove that some of the statements were false when made. A bill of particulars serves to prevent such surprise to a defendant. *Williams* v. *United States*, 289 F.2d 598, 601 (9th Cir. 1961). Defendant requests that the government particularize which section of the statute is being proceeded under, and if it is subsection c, then which particular declarations are alleged to be inconsistent with each other.

To answer that any ambiguity, as the government states in its Response, is "resolved by a reading of the grand jury transcript against the transcript of Mr. Dunn's subsequent statement under oath . . ." points out the very problem. The defendant is entitled to know *which* statements in the grand jury transcript are to be read against *which* statements in the subsequent sworn statement.

Paragraph one of each count alleges that the defendant "while under oath as a witness before a Grand Jury of the United States in the District of Colorado, did *knowingly make* a *false* material *declaration*, *as more fully set forth* in paragraphs 2 through 6 of this Count ——, in violation of Title 18, United States Code, Section 1623." (See Indictment; Emphasis added.) In

paragraphs 4 and 5 of each count, certain declarations are alleged to have been made without specifying which were allegedly false. Paragraph one alleged that false declarations were made and promised to "more fully set forth" those false declarations but did not identify those which are alleged to be false as promised.

In paragraph 6 of each count, the indictment alleges that "[t]he aforesaid declarations by Robert Dunn, as set forth in paragraphs four (4) and five (5) of this Count—were inconsistent to the degree that one of said declarations was false and known by him to be false when made." (See Indictment.)

Thus, the government has charged in paragraph one in each count that false declarations were made before the federal grand jury but has not specified which were false. Under such an allegation, the government must prove beyond a reasonable doubt that such an allegation was knowingly false when made.

Title 18, U.S.C. § 1623(c) provides, however, that where the defendant "has knowingly made two or more declarations, which are *inconsistent to the degree that one of them is necessarily false* . . ." the government "*need not specify which declaration is false* . . ." if certain conditions are met. Title 18, United States Code, Section 1623(c) (as amended, 1970). The inconsistent declarations language is alleged in paragraph six of each count.

Therefore, paragraph one of each count charges a false declaration under 18 U.S.C. § 1623(a) without specifying which is false, and paragraph 6 charges inconsistent declarations under 18 U.S.C. § 1623(c) and need *not* specify which is false. Defendant submits the government cannot have the best of both worlds. The defendant is entitled to know under which subsection the government is proceeding and what it is expected to defend against at trial.

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

[Title Omitted in Printing]

GOVERNMENT'S RESPONSE TO
MOTION FOR BILL OF PARTICULARS—
Filed March 18, 1977

THE MOTION FOR BILL OF PARTICULARS SHOULD BE DENIED, BECAUSE THE GOVERNMENT IS NOT REQUIRED TO STATE OR PROVE, IN A PROSECTUTION UNDER 18 U.S.C. § 1623, WHICH OF TWO INCONSISTENT DECLARATIONS IS FALSE.

Defendant has requested the Government to specify, in a Bill of Particulars, which of defendant's statements set forth in the Indictment was false or, in the alternative, which of the allegedly inconsistent declarations in each count of the Indictment are inconsistent with each other. The argument appears to rest on the premises (1) that two separate types of offenses can be alleged under 18 U.S.C. § 1623, one under subsection (a) and the other under subsection (c), and (2) that the Government is required to state and prove which of two allegedly inconsistent declarations is false. We disagree with both premises and thus resist the Motion for a Bill of Particulars.

Title 18 U.S.C. § 1623(a) says it is a crime to make "any false material declaration . . . in any proceeding before or ancillary to any court or grand jury of the United States . . . ." Title 18 U.S.C. § 1623(c) merely defines what an indictment, charging false declarations before a grand jury, must allege and articulates one way of proving a false declaration before a grand jury. It does not delineate a separate offense. All of this is stated in the legislative history of the section:

> *This subsection* [subsection c], *as amended by the committee, therefore, provides specifically for the prosecution of a false declaration in the case of irreconcilable contradictory statements without the necessity of specifying which of the declarations is false. It requires that each declaration upon which the prosecution is based was material to a point in question in the proceeding in which it was made, and was made within the period of the statute of limitations for the offense charged. . . . It should be noted that the subsection relates solely to the establishment of the element of falsity in the offense which is delineated in subsection (a).* H.R. Rep. No. 91-1549 (91st Cong., 2d Sess). [1970 U.S. Code Cong. & Admin. News 4007, 4023.] (Emphasis supplied)

As the legislative history demonstrates, we do not need to prove at trial which of the declarations is false. Therefore, we should not have to specify in a Bill of Particulars which is false. As for the alternate request that we specify which of the declarations is inconsistent with the other, the Government's position is that the declarations set forth in each count of the Indictment speak for themselves. To the extent that there is any ambiguity in definition of terms, such as the meaning of the word "stuff" in paragraph 4 of Count I, that ambiguity is resolved by a reading of the grand jury transcript against the transcript of Mr. Dunn's subsequent statement under oath. Defense counsel has both of those documents, and there would thus seem to be no need for a Bill of Particulars defining which of the statements is inconsistent.

Dated at Denver, Colorado, this 18th day of March, 1977.

Respectfully submitted,

JAMES L. TREECE
United States Attorney

By: /s/ Edward W. Nottingham
EDWARD W. NOTTINGHAM
Assistant United States Attorney
323 U.S. Courthouse
1929 Stout Street
Denver, CO 80294
837-2081
Attorneys for Plaintiff

DEFENDANT'S EXHIBIT F-1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. ————

IN THE MATTER OF THE GRAND JURY

APPLICATION FOR ORDER TO GRANT IMMUNITY AND COMPEL TESTIMONY UNDER TITLE 18, UNITED STATES CODE, SECTIONS 6002-6003—Filed June 16, 1976

The United States Attorney for the District of Colorado makes application to the United States District Court for the District of Colorado for an Order granting immunity to and compelling the testimony of ROBERT DWIGHT DUNN pursuant to Title 18, United States Code, Sections 6002-6003. The reasons for this application are as follows:

1. The Federal Grand Jury presently sitting at Denver, Colorado, was duly empanelled and sworn on February 11, 1975, and is presently investigating violations of the following criminal statutes of the United States:

Title 21, United States Code, § 841(a)(1)
Title 21, United States Code, § 846

2. The witness ROBERT DWIGHT DUNN on June 15, 1976, appeared in person pursuant to subpoena issued in connection with the above investigation before the Federal Grand Jury presently sitting in Denver, Colorado, and refused to testify, relying on his Fifth Amendment privilege against self-incrimination;

3. Mr. Richard L. Thornburgh, Assistant Attorney General of the United States by authority vested in him by Title 18, United States Code, Sections 6002-6003 and Title 28, Code of Federal Regulations, Section 0.175 has granted authority by letter to the United States Attorney for the District of Colorado to make application to the United States District Court for the District

of Colorado for an order or orders granting immunity and compelling the testimony of ROBERT DWIGHT DUNN pursuant to Title 18, United States Code, Sections 6002-6003;

4. The United States Attorney for the District of Colorado represents to the United States District Court for the District of Colorado that the testimony and other information from ROBERT DWIGHT DUNN is necessary to the public interest;

WHEREFORE, the United States Attorney for the District of Colorado, makes application to the United States District Court for the District of Colorado for an order to grant immunity to and compel the testimony of ROBERT DWIGHT DUNN pursuant to Title 18, United States Code, Sections 6002-6003.

/s/ James L. Treece
JAMES L. TREECE
United States Attorney for
the District of Colorado

ASSISTANT ATTORNEY GENERAL
CRIMINAL DIVISION

DEPARTMENT OF JUSTICE
Washington 20530

RLT:KWM:CAC:clb
84381

June 10, 1976

Honorable James L. Treece
United States Attorney
District of Colorado
Denver, Colorado 80202

Attn: Rod Snow
Assistant United States Attorney

Re: Grand Jury Investigation
Robert Dewight Dunn

Dear Mr. Treece:

Pursuant to the authority vested in me by 18 U.S.C. § 6003(b) and 28 C.F.R. § 0.175(a) I hereby approve your request for authority to apply to the United States District Court for the District of Colorado for an order pursuant to 18 U.S.C. § 6002-6003 requiring Robert Dewight Dunn to give testimony or provide other information in the above matter and in any further proceedings resulting therefrom or ancillary thereto.

Sincerely,

/s/ Richard L. Thornburgh
RICHARD L. THORNBURGH
Assistant Attorney General
Criminal Division

[SEAL]

DEFENDANT'S EXHIBIT F-2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. ———

IN THE MATTER OF THE GRAND JURY

ORDER GRANTING IMMUNITY AND COMPELLING TESTIMONY UNDER TITLE 18, UNITED STATES CODE, SECTIONS 6002-6003—Filed June 16, 1976

Upon the application of the United States Attorney for the District of Colorado for an Order Granting Immunity and Compelling Testimony under Title 18, United States Code, Sections 6002-6003, the United States District Court finds as follows:

1. The Federal Grand Jury presently sitting at Denver, Colorado, was duly empanelled and sworn on February 11, 1975, and is presently investigating violations of the following criminal statutes of the United States:

Title 21, United States Code, § 841(a)(1)
Title 21, United States Code, § 846

2. The witness ROBERT DWIGHT DUNN on June 15, 1976, appeared in person pursuant to subpoena issued in connection with the above investigation before the Federal Grand Jury presently sitting in Denver, Colorado, and refused to testify relying on his Fifth Amendment privilege against self-incrimination;

3. Mr. Richard L. Thornburgh, Assistant Attorney General of the United States, by authority vested in him by Title 18, United States Code, Sections 6002-6003, and Title 28, Code of Federal Regulations, Section 0.175, has granted authority to the United States Attorney for the District of Colorado to make application to the United States District Court for the District of Colorado for an order or orders granting immunity and compelling

the testimony of ROBERT DWIGHT DUNN pursuant to Title 18, United States Code, Sections 6002-6003;

4. The United States Attorney for the District of Colorado represented to the United States District Court for the District of Colorado that the testimony and other information from ROBERT DWIGHT DUNN is necessary to the public interest;

THEREFORE, it is hereby ordered as follows:

1. That the witness ROBERT DWIGHT DUNN give testimony and provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination and that the witness is not excused from testifying or providing other information on the ground that such testimony or information may incriminate him or subject him to penalty or forfeiture;

2. That no testimony or other information compelled under this order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness ROBERT DWIGHT DUNN in any criminal case, in any court, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with this order.

Dated at Denver, Colorado, this 15th day of June, 1976.

BY THE COURT:

/s/ [Illegible]
United States District Judge

GOVERNMENT EXHIBIT 1-a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
FEDERAL GRAND JURY

IN THE MATTER OF THE FEDERAL GRAND JURY

TESTIMONY OF ROBERT DWIGHT DUNN

Grand Jury Hearing Room
164 United States Courthouse
Denver, Colorado 80202
Wednesday, July 16, 1976

The above-entitled matter came on for hearing before the Federal Grand Jury at 9:25 o'clock a.m., this date.

APPEARANCES:

For the United States Government	RODNEY W. SNOW, ESQ. Assistant United States Attorney 323 United States Courthouse Denver, Colorado 80202

[p. 2]

PROCEEDINGS

ROBERT DWIGHT DUNN,

a witness herein, after having been first duly sworn by the Foreman to tell the truth, the whole truth and nothing but the truth, was examined and testified as follows:

EXAMINATION

BY MR. SNOW:

* * * *

[p. 3]

Q State your name, please?
A Robert Dwight Dunn.

* * * *

Q When did you first get involved in the drug scene?
A 1969.

* * * *

[p. 9]
Q All right. Do you recall having an occasion to go to Vicki Burr's house at 480 South Washington?
A Yes, sir, I do.

* * * *

[p. 10]
Q All right. Let's go back to what happened there at South Washington. Did you meet Phillip Musgrave there?
A Yes, sir, I did. I was selling bags, which was very—I don't do that very often.
Q Why, because it's a lot or what?
A No. I just—I recognize myself as in the security part of—or have been in the security part of the illicit speed traffic. I check for security. If they're security type, they don't get ripped; if it's not, I rip them and I've never had anybody come back on me. So I was out selling bags—I was doing more than I was selling, but I was putting up a front that I was selling and Sparky had asked me if I had any bags, that he had someone who wanted to buy one and Sparky—he run around with me for a while, so he more or less knew what I did and he did the same thing and I was afraid he was going to try and rip me, so I said, "No, I'll sell him the bag." And we went in the bedroom and there was a fairly good-sized dude, about six foot, two hundred pounds, leather hat, beard and doberman pinscher, and I knew who it was because I had

[p. 11]
heard stories about him.
Q Did you know him as Cebe?
A Everybody called him Steve.
Q Steve?
A Steve. I think it was a mistake in names. They used to call him Cebe; his middle name was Cebe, but somebody got Steve started and he just kept the name Steve. He just got out of jail and didn't have any dope

with him in town so I sold him a half gram and I took a half gram and we got high together and he paid me and he said the next time he was in town, he'd square me away, that he just didn't have anything with him.

* * * *

[p. 14]
Q When you got to Canon City, did you see Musgrave?
A First day.
Q Where did you see him?
A At Diagnostic Center in the fish tank. I was on the second tier on the east side and he was on the third tier on the west side and he was right directly across from me. And I had heard from a couple of people that he was hot on my case; I was supposed to be setting him up with the man and the only thing I was trying to set him up for was relieving him of what he had.

[p. 15]
Q Did you get high, then, in the penitentiary?
A You bet. Stayed high in the penitentiary.
Q Did he have drugs there in the penitentiary?
A All the time.
Q Did you work with him or for him in the penitentiary?
A I was a gopher boy; I went for pop, commensary and held his stash for him.
Q What did you get in return?
A A fair amount of speed every time he'd cop.
Q Every time he had some, he'd give you some?
A Oh, yes, sir. I don't know whether it was because he liked me, because he wanted to do it, or because he was

[p. 16]
paranoid if he didn't do it, something bad would happen at first.
Q Did you assist him in getting stuff smuggled into the penitentiary?
A Yes, sir, once.
Q Was that with the Strammels?
A Yes, sir.

Q Would you tell us about that, please?
A How shall I get around that one part?
Q Well, jut tell them about that one part.
A Okay. It was just before noon, I think it was a Wednesday, and the block officer came down and told me I had a visitor—there was some people to see me, but it was too late, they were closing the visiting room for the feeding period and to be ready to go to a visit right at 1:30. And Musgrave is standing right beside me, or a few feet from me when he told me this and he told me, "When you go to the visiting room, don't go to the visiting room until I come down." So we went back ourselves for count and lock up and he came down with —this is going to be bad.
Q Did he give you some vaseline?
A Yes, sir, he did.
Q What did he tell you to do with the vaseline?
A Grease up—it's called keystring in the penitentiary. It's the most popular way of getting drugs in the penitentiary.

[p. 17]
Q Was it you were supposed to take the drugs and put it into your rectum?
A Yes, sir.
Q Did you do that?
A Yes, sir, I did.
Q Who gave you the drugs?
A Steve handed it to Musgrave and Musgrave handed it to me.
Q You did what with it?
A Over a period of five or six minutes of wiggling around and watching for cameras and cops, I got it up there.
Q Is that the way you get it back in the cell so you can later get it out and use it?
A Yes, sir, because you get strip-searched, you know, when you got back through the visiting room.
Q Okay.
A And when I got back to my cell, I got it out and he came down and got it and went up to his cell, pulled

his out, pulled a pretty good portion out for me and brought it down for me.

* * * *

[p. 28]
Q Okay. Now, did you have discussions with Musgrave while you were in the penitentiary about how he was going to set up the organization once he got outside?

* * * *

A Never come in contact with the people, just do it by mail.
Q Did he name particular people—Eddie Perkins, for instance?
A Eddie Perkins, I didn't meet him until he brought me a half ounce one night and that was a gesture on Cebe's part to keep me away from Ken Brown.
Q We'll come back to that.
A Okay.

* * * *

[p. 29]
Q Did he tell you about Kate, how she fit into this

[p. 30]
or do you know?
A When he went to the penitentiary he had two old ladies or two girls, Kate Blehm and Judy Schultz, and he told them the one that held up while he was in the joint would benefit from his release and Judy blew it and started doing a whole bunch of downers and started getting crazy shooting at people and Kate won out; and she took instructions from him through the mail and on the phone about what to do and who to take care of, to send what where.
Q He called from the penitentiary and told her?
A Two or three times a day.
Q Can you make calls like that out of the penitentiary?
A They have pay phones at the penitentiary.
Q And no one pays any attention to what they say or anything?
A No.

* * * *

[p. 33]

Q (By Mr. Snow) Okay. Let's go back to Musgrave and Kate. Did he tell you if Kate was supplying—you say you got some dope in the penitentiary from Steve and Debbie Strammel?

A Yes.

Q Did he tell you whether or not there was any connection between Steve and Debbie and Kate?

A Steve and Debbie kept their connection while he was locked up solely for the purpose of bringing him his dope when he wanted it.

Q Was Kate connected with that at all?

A She would make sure that Steve and Debbie were supplied with, you know, what they needed to sell when they were selling and what Cebe needed in the penitentiary.

Q Did you make some calls for Musgrave to Kate?

[p. 33]

A Yes, sir, I did.

Q Did he give you the phone number?

A Yes, sir, both of them.

[p. 34]

Q He gave two phone numbers?

A One where she worked at the—881-2273, at the Rustic Resort and at home, 881-2278, and that's in Belleview. I may have them numbers mixed up, but I'm not sure. It's been quite a while since I called the number.

Q So you would call and give messages to Kate also in addition to Musgrave?

A Yes.

Q Did you have any code names you were supposed to use?

A He was one, Jimmy Heath was two and I was three.

Q Did you talk about speed or did you use another word?

A Bull shit, excuse me.

Q That was the code name for the speed?

A Yes, sir.

Q And did Kate visit Musgrave often?

A Twice a week.

* * * *

[p. 49]

Q Now, who is Eddie Perkins?

A Eddie Perkins; he was unknown to me until I heard his name one night dropped by somebody that he was Cebe's new chemical man, that's the person that his main function is to buy, transport, stash and take the heat for buying chemi-

[p. 49]

cals that are restricted or that are directly related with making speed.

Q Did you have a meeting with Perkins some time?

A He came down one night. Cebe sent me down a half ounce as a bonus for the girl I got him, that Kris.

Q Was this in November or December of '75?

A Yeah.

Q Okay.

A And Eddie Perkins come down and delivered it.

Q Delivered it to you?

[p. 50]

A No, he come in kind of funny. He come in the front door of the apartment, said it was on the outside window sill of the bedroom and it was one of these—it was a basement where you couldn't roll the windows and they were roll-type windows and you couldn't roll them all the way out and I couldn't get my arm out there and Charlotte, my girl at the time, couldn't get her arm out there, so he stuck his arm out there and got it.

Q And gave it to you?

A Yes, sir, and then he did about six 180 degree turns and out the door.

* * * *

[p. 52]

Q Did you then in January of this year—did you get a regular job?

[p. 53]

A Yes, sir, I did.

Q Where?

A Continental Oil, Ramsey Engineering; subcontracting.

Q Did you discover any chemicals while you were working there?

A I sure did—discovered a whole warehouse full, but they were all the wrong chemicals.

* * * *

[p. 55]

Q During February of '76, did you see Musgrave again and find out—did he say that he still wanted any of those chemicals?

A Yes. I was living out on West 58th Avenue in Arvada, 14500 West 58th. It was a 10-acre farm that me and a friend of mine was renting—me and a friend of mine and his wife, and it was pretty excluded, had a barn. And the guy that I was living with, he worked out at Continental Oil also and he came into town looking for me on a Monday and I had just had some teeth pulled and I didn't feel like messing with anybody so I just started spacing him out—just not meeting when I was supposed to, and he chased me for three and a half days until he finally caught up with me.

Q What did he want when he caught up with you?

A Propenyl, methylamine. He wrote out on an envelope—a big manilla envelope that I still have—all the chemicals that are needed.

Q Musgrave wrote this out on the envelope?

A Yes, sir.

Q And you still have access to that envelope?

A Yes, sir, I hope. I've been away for an hour, so things are a little shaky.

* * * *

[p. 62]

Q All right. Who else? How about the Strammels?

A Steve and Debbie for a while, while he was in the penitentiary were given the opportunity to keep a speed connection while he was in jail if they agreed to deliver certain amounts of speed to him at the penitentiary or smuggle them into the penitentiary or to whatever people, you know, individuals he wanted it smuggled to.

Q You were one of those people that smuggled in, right?

A Yes.

Q Whoe else—Heath?

A Jimmy Heath, Gary Ryan and Al Reeves.

Q Ryan?

GOVERNMENT EXHIBIT 2-A

AFFIDAVIT OF ROBERT DWIGHT DUNN

September 30, 1976

APPEARANCES:

CANGES & SHAVER
By Michael Canges, Esq.
1025 Capitol Life Center
Denver, Colorado

[p. 2]

The examination of Robert Dwight Dunn, was taken on Thursday the 30th day of September, 1976, at 1025 Capitol Life Center, Denver, Colorado, commencing at the hour of 10:10 a.m., before Jerald B. Cohen, Notary Public within and for the State of Colorado.

REPORTER'S NOTE: You may note in this deposition that some portions are typed in UPPER CASE LETTERS.

When two or more persons are speaking simultaneously, the simultaneously spoken portions will be transcribed in UPPER CASE LETTERS. Should a greater need for clarity occur in the deposition, it is transcribed so that each speakers' every word, in sequence, is clearly understandable.

* * * *

[p. 3]

PROCEEDINGS

MR. COHEN: Mr. Dunn, would you raise your right hand please? Is the testimony that you are about to give, to be the truth, the whole truth and nothing but the truth, so help you God?

MR. DUNN: It is.

EXAMINATION

BY MR. CANGES:

Q. Mr. Dunn, you are, at present, in my offices. I am Michael Canges and I'm an attorney.

A. Yes sir.

Q. And we're in the Capitol Life Center. It's approximately 10:15 in the morning. What's the date . . twenty . . . .

MR. COHEN: 30th.

Q. On September 30th. Am I correct?

A. Yes sir, you are.

Q. You and I are present in my conference room. Present is Mr. Jerald Cohen, who has identified himself to you as a person authorized by the statutes of the State of Colorado as a person to administer oaths. You understand that?

[p. 3]

A. Yes sir.

Q. And you have taken an oath at this moment to tell the truth, the whole truth and nothing but the truth, have you not?

A. Yes sir, I have.

Q. You understand, Mr. Dunn, that we are on tape and what

[p. 4]

you and I discuss will be transcribed and ultimately reduced to writing, to the extent of a transcript?

A. Uh huh.

Q. What is your name please?

A. Robert Dwight Dunn.

* * * *

[p. 4]

Q. You understand that I'm Phillip Musgrave's attorney?

A. Yes sir.

Q. And you know Phillip, do you not?

A. Yes sir, I do.

* * * *

[p. 5]

Q. Alright. At the time you went to the institution, explain to me the physical location of where your cell was vis-a-vis where Phillip's cell was.

A. I was on the second tier in . . in the fish tank . . . when I

[p. 6]

first arrived. I was on the second tier on the . . . east, east two . . . east two side and Phillip was on the west three side.

Q. During THE PERIO . . .

A. WHICH WAS ALMOST just directly . . . we were . . had a direct cells, right directly across.

Q. During the period of time that you were in the institution with Phillip, did you get to know each other PRETTY WELL?

A. YES sir, we did.

* * * *

[p. 8]

Q. Now prior to your testimony to the Grand Jury, you discussed the matters that you testified to with certain law enforcement officials. Am I correct?

A. Yes sir.

Q. Who were those persons?

A. Uh . . Mr. Ronald Hollingshead and Mr. James Congrove.

Q. By whom is Mr. Hollingshead employed?

A. DEA

Q. AND WHO . . . .

A. DRUG ENFORcement Administration.

Q. Alright. That's an agency of the Federal Government?

A. Yes sir, it is.

Q. And by whom is Mr. Congrove employed?

A. Uh, Jefferson County Sheriff's Department. Uh . . investigator.

* * * *

[p. 11]

Q. Explain what you mean to me by your play.

A. Well I . . . I'm running a bluff, is what I'm doing. Is what I began and that's what I'm still doing. I hope that I can

[p. 12]
come out . . . I hope the curtail falls behind me and not on me. Uh, I told them, uh, he had about nine or ten pages of writing, this Mr. Hollingshead, on legal pad paper.

Q. What color was that paper?

A. Yellow.

Q. Alright sir.

A. Yellow lined paper. Uh, and I just commenced to making up stories. Now, now each story, I mean, each incident that I told him about, was . . . there was some, there was something in it. Like there was an incident, but I, I put an incident together with me and Phillip or me and you know, whoever. They got maybe ninety percent fairy tales and ten percent of what I'd heard.

Q. At the TIME THAT . . .

A. UH . . BUT THEY WENT for every bit of it.

Q. At the time, Mr. Dunn, that you made the statement to uh Officer Hollingshead and Officer Congrove, did they specifically ask you questions or . . .

A. Yes sir, they did. Uh, they asked me . . . phone numbers. Phillip's old phone number, in Fort Collins. Had I ever purchased any uh . . . drugs from Phillip. And I told them no. That I hadn't. Told them that I . . I had been given which I haven't. Hell, I've sold him . . I sold him items before, myself.

Q. What sort of items had you sold?

A. I sold him uh . . . a half gram of speed in 1973.

Q. The things that you told or the things you discussed.

[p. 13]
with Officers Congrove and Hollingshead, were they true?

A. No sir. Uh, ten percent was . . was true as far as I, you know, as far as I know.

* * * *

[p. 18]

Q. Now with reference to the items you testified to in front of the Grand Jury, I don't want to know specifically what you said, but was what you said basically what you had told Mr. Hollingshead or Mr. Congrove?

A. Basically, yes, but it was uh . . . Mr. Snow had a pattern

[p. 19]
of questions or had a list of questions and each time he asked me a question, I'd answer and when I'd finish that answer he . . . he'd come with another question that was really leading, you know.

Q. Did you review the questions before. . . .

A. No, sir.

Q. . . . . the Grand Jury testimony?

A. No sir.

Q. Was what you told Mr. Hollingshead and Mr. Congrove before you testified in front of the Grand Jury, was it true?

A. No sir.

Q. Alright.

A. Partially.

* * * *

[p. 22]

Q. Now, at the time of your testimony before the Grand Jury, you took an oath did you not, to tell the truth?

A. Yes sir, I did.

Q. And, in fact, did you tell the Grand Jury the truth?

[p. 23]

A. No, sir I didn't.

[p. 23]

Q. During the time that you were in the penitentiary uh did Phillip Musgrave ever give you any drugs of any sort?

A. No sir, he didn't.

Q. Were there drugs available?

A. Oh, there's plenty of drugs available in the penitentiary.

* * * *

[p. 24]

Q. Did Phillip, to your knowledge, ever help Jimmy Heath smuggle in drugs?

A. No sir.

Q. Did Phillip, to your knowledge, ever smuggle in or cause to be smuggled in drugs for any person?

A. No sir.

Q. Alright.
A. Not that I know of.

* * * *

[p.26]
Q. Alright. During the time you were in the institution uh did you ever have occasion to make telephone calls for Phillip?
A. Yes sir.
Q. And explain to me why that was or to whom those calls were made?
A. Uh they . . . us . . . in the Cell House you have two different sides of the cell house itself. You have Block A and Block B. I lived on Block B and Phillip lived on Block A. One night Block A'd be out for the night you know, TV uh cards what-

[p. 27]
ever, and phone calls and the other . . . the next night Block B would be out. Well, it was my night to be out and Phillip was locked up and I went up and was talking to him and he asked me if I would call Kate cause we had made some tarot cards.
Q. Now who is Kate?
A. Kate Blehm.
Q. And who was she?
A. Phil's uh girl.
Q. Alright.
A. Uh he asked me if I would call her and ask . . . and have her bring up a book, you know, like a tarot card book that uh shows you how to read 'em and how to understand 'em. And uh to be sure and come up and see him. Uh that was it.
Q. Was there any mention or any code with reference to drugs in any conversation with Kate Blehm?
A. No sir.
Q. Did Phillip tell you what to say to her insofar as code which might involve speed or the smuggling of drugs into the institution?
A. No sir. All he said was see . . . tell her to get me uh a tarot card book and to be sure and come up and see him.
Q. Alright. And what was the purpose or what was the meaning of the tarot card book?

A. We had made some tarot cards out of like uh like poster paper, thick paper, and Phillip's uh quite an artist uh and he

[p. 28]
drew these cards from a . . . it was a small deck of tarot cards, it was just a . . . kind of like a . . . what the hell was it? Oh, no. I'm wrong. We . . . he wanted a set of tarot cards. We had a book. That's what it was. I'm sorry, that . . . whew . . . that was my mis-

[p. 28]
take. We had a book, but we needed the cards and then that's when . . . and they wouldn't let 'em in, they wouldn't allow 'em in so Phillip draw some. That's what it was.
Q. Were you ever present at any time when Phillip gave Frank Brannan any chemicals?
A. No sir.
Q. Alright. Do you recall ever telling Mr. Hollingshead or Mr. Cosgrove or any other law enforcement officer that you were present at such a time?
A Yes sir.
Q. Alright. Was that true?
A. No sir.
Q. Do you remember whether or not there was any conversation that you were present at or that you heard about where Mr. Brannan was to give chemicals and money to Mr. Musgrave or vice versa?
A. No sir. I . . . now I told the two law enforcement officers that, you know, that I was.
Q. Was that true?
A. No sir, it wasn't.
Q. Did you ever at any time ever get a list of chemicals

[p. 29]
from Mr. Musgrave for any purpose?
A. No sir.
Q. Did Mr. Musgrave ever give you any drugs at any time?
A. No sir.

* * * *

[p. 29]

Q. At any time while you were in the institution, did Phillip ever give you a hit of speed or any drug of any sort?

A. No sir.

Q. At any time did you smuggle in drugs for Phillip?

A. No sir.

Q. Did you at any time smuggle in drugs for any other person?

A. No sir.

* * * *

[p. 35]

Q. Did you ever know Eddie Perkins?

A. Yes sir, I met him one time . . a couple times.

Q. Alright. Did you ever have any dealings with him of any sort?

A. No sir.

Q. You met him several times?

A. I don't like the individual, no sir.

Q. Alright. You had nothing to do with him?

A. No sir.

Q. Under what circumstances had you met him?

A. Uh came by my apartment on uh 925 West uh Eight Avenue one night and told me that Phillip was in town and that if I wanted to meet him for dinner, you know, meet him, and uh cause he wanted to talk to me.

* * * *

[p. 46]

Q. You've met Eddie Perkins once or twice?

A. Uh twice.

Q. And how long did each of those meetings or uh social events take place?

[p. 46]

A. With Mr. Perkins the first time, it was about three minutes. In other words, he came in and delivered a message you know, Phillip was in town and if I wanted to see and meet him for dinner. And the second time was at uh Aurora, a friend of mine's house. Went out to uh . . . I went out to sell a guy some tires and Eddie was there. Uh somethin' happened to his car. Oh, his

wife or his ex-wife took his car and he didn't have any transportation. And he was waitin' for a ride and I . . . that was no more than hello and goodbye.

Q. Did you ever have any business dealings of any sort with Mr. Perkins?

A. No sir.

Q. Did you every buy any speed from him?

A. No, but I'd sure like to sell him some.

Q. Did you sell him any?

A. No.

Q. Alright. Did you ever discuss speed with Mr. Perkins?

A. No sir.

* * * *

[p. 51]

Q. What about Steve Stramel. Did you ever know Steve Stramel?

A. Uh not knowing, by being introduced to him. I seen him one time.

Q. Where did you see him?

A. Uh him and a girl Debra, Debbie uh came up to see Phillip and I seen him across the visiting room. I was visiting with some friends of mine that came up from Denver and I just seen him from a distance. I . . . I couldn't eve . . . I doubt if I could recognize him.

Q. You never had any conversation with either Steve. . . .

A. No sir.

Q. . . . . or his girlfriend or wife, Debbie?

A. No.

[p. 52]

Q. Did you ever smuggle in drugs to the institution from Steve and Debbie?

A. No sir.

Q. Ever smuggle in drugs on behalf of Phillip or at Phillip's suggestion?

A. No sir. As a matter of fact, Phillip was uh more or less . . . well, he stayed on my case to stay out of trouble. He more or less, you know, if uh I was messin' up or getting in trouble uh he was . . . him and Steve

were the first two down on my case forit. You know, to whip me back in line cause I' . . . I'm pretty much a mess-up.

* * * *

[p. 62]

Q. All right. Who else? How about the Strammels?

A. Steve and Debbie for a while, while he was in the penitentiary were given the opportunity to keep a speed connection while he was in jail if they agreed to deliver certain amounts of speed to him at the penitentiary or smuggle them into the penitentiary or to whatever people, you know, individuals he wanted it smuggled to.

Q. You were one of those people that smuggled in, right?

A. Yes.

GOVERNMENT EXHIBIT 4-a

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Action No. 76-CR-155

UNITED STATES OF AMERICA, PLAINTIFF

vs.

PHILLIP C. MUSGRAVE, et al., DEFENDANTS

EXCERPT OF PROCEEDINGS

(Direct Examination of Robert Dwight Dunn)

Proceedings before the HONORABLE FRED M. WINNER, Chief Judge, United States District Court for the District of Colorado, for hearing on all pending motions commencing at 11:10 a.m. on October 21, 1976, in Courtroom A, United States Courthouse, Denver, Colorado.

APPEARANCES

EDWARD W. NOTTINGHAM and ROD W. SNOW, Assistant United States Attorneys, appearing for plaintiff.

ELMER LEE HAMBY, Attorney at law, Denver, Colorado, and DAVID L. WORSTELL, Attorney at law, Denver, Colorado, appearing for the witness Robert Dwight Dunn.

E. MICHAEL CANGES, Attorney at law, Denver, Colorado, and JOSEPH SAINT-VELTRI, Attorney at law, Denver, Colorado, appearing for the defendant Phillip C. Musgrave.

WILLIAM L. KEATING, Attorney at law, Denver, Colorado, appearing for the defendants Edward G. Perkins and Charles Frank Brannon.

SHELLEY B. DON, Attorney at law, Denver, Colorado, appearing for defendant Kim L. Duleff.

[2] PROCEEDINGS (3:30 p.m.)

(Prior proceedings were had and entered of record but are not herein transcribed pursuant to direction of ordering counsel.)

MR. CANGES: Call Robert Dwight Dunn.

MR. HAMBY: Your Honor, private counsel appears with Mr. Dunn to assume the duties that I was appointed to perform. I would like to ask to be excused.

THE COURT: You may be excused, Mr. Hamby. Thank you very much.

MR. WORSTELL: Just for purposes of the record, Your Honor, my name is David Worstell, W-o-r-s-t-e-l-l, of the law office of Al Zinn; and I do represent Mr. Dunn.

THE COURT: Very well. And, of course, Mr. Worstell, you may sit somewhere up here where you are at a convenient place from which you may object, if you wish to object, as counsel for Mr. Dunn.

MR. WORSTELL: Thank you, Your Honor.

ROBERT DWIGHT DUNN, called as a witness for the defense herein, being first duly sworn on his oath testified as follows:

DIRECT EXAMINATION

BY MR. CANGES:

Q If it please the Court, for the record would you state your name and address?

[3] A Robert Dwight Dunn, 1245 South Pennsylvania.

Q Mr. Dunn, you are the same Robert Dwight Dunn that has been previously mentioned as an unindicted co-conspirator in the action entitled United States of America vs. Phillip C. Musgrave, et al., bearing Criminal Action 76-CR-155, are you not, sir?

A That's correct.

Q You had occasion at some point during the summer months of 1976 to testify before a federal grand jury.

A Yes, sir, I did.

Q And, in fact, you did so testify, did you not?

A Yes, sir.

Q Mr. Dunn, you are present in the United States District Court for the District of Colorado on the afternoon of Thursday, October 20th, am I correct?

A Yes, sir.

Q You understand where you are and who is present at this time.

A Yes, sir.

Q Do you understand that I'm Phillip C. Musgrave's attorney?

THE COURT: Let me make a recommendation to you.

MR. CANGES: Yes, sir.

THE COURT: Let's make it the 21st.

MR. CANGES: I beg your pardon, Your Honor.

[4] Q Today being October 21st and approximately 3:30 in the afternoon.

A Yes, sir.

Q Present with you in court is your attorney, am I correct?

A Yes, sir.

Q What is his name, sir, please?

A David Worstell, seated right there. (Indicating)

Q During the course of the day you have had occasion to consult with him, have you not?

A Yes, sir.

Q Are you satisfied with the advice that you have had and the representation he has given?

A Very much so.

Q You had the occasion to consult with an Elmer Lee Hamby who was appointed by this Court to represent you with reference to certain matters, am I correct?

A Yes, sir.

Q Mr. Dunn, on or about September 30, 1976, did you appear in my office at 1025 Capitol Life Center in Denver, Colorado?

A Yes, sir, I did.

Q And at that time was there present a Mr. Jerald Cohen who was a certified reporter and a notary public pursuant to the statutes of the State of Colorado.

[5] A Yes, sir, there was.

Q At that time did I ask you certain questions and did you make certain answers to those questions?

A Yes, sir, I did.

Q And at that time did you tell the truth, the whole truth, and nothing but the truth?

A I did, sir.

Q Mr. Dunn, have you had occasion to review that certain transcript or affidavit of the conversation or colloquy that transpired on September 30th?

A Yes, sir, all but about the last five or ten pages.

Q And referring to that affidavit—

MR. CANGES: For the record, that would be the affidavit that was tendered to this Court, a copy of which has been tendered to both the United States and to co-counsel.

Q Mr. Dunn, with reference to that affidavit, and now having had the occasion to again review it, are the contents of that affidavit true?

A Yes, sir.

Q With reference to your testimony before the grand jury, as I understand it, your testimony encompassed acts over a period of some several years with reference to certain statements that you made concerning alleged distribution of methamphetamines on behalf of Mr. Musgrave and other co-defendants, am I correct?

[6] A Yes, sir.

Q Was what you told the grand jury true?

A No, sir.

Q Was any part of it true?

A Possibly ten percent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT DUNN, DEFENDANT

TRANSCRIPT OF TRIAL PROCEEDINGS—
April 13, 1977

Pursuant to recess, proceedings were resumed before the HONORABLE SHERMAN G. FINESILVER, Judge of the United States District Court for the District of Colorado, beginning at 8:35 a.m. on the 13th day of April, 1977, in Courtroom D, United States Courthouse, Denver, Colorado.

APPEARANCES:

EDWARD W. NOTTINGHAM, Assistant United States Attorney, Denver, Colorado, appearing for the plaintiff.

DANIEL J. SEARS, Federal Public Defender, Denver, Colorado, appearing for the defendant.

[OFFER OF DEFENDANT'S EXHIBITS F-1 AND F-2, OBJECTION TO PLAINTIFF'S EXHIBIT 2]

[T. Vol. II, p. 21]

MR. SEARS: Your Honor, I might state for the record that the offer of Defendant's Exhibits F-1 and F-2 are with regard to the immunity granted to Robert Dwight Dunn, which the defense would submit immunizes the submission of Plaintiff's Exhibit 2, which has not been offered yet, but as a matter of foundation, which we submit is an indirect result of the immunity afforded Mr. Dunn before the Federal Grand Jury.

THE COURT: Any objection?

MR. NOTTINGHAM: I still object to the relevancy, Your Honor. I don't think this immunizes him from a perjury charge, so I am still saying that they are not relevant to this proceeding.

THE COURT: The Court will admit the court file as identified. The Court will admit in evidence Defendant's Exhibits F-1 and F-2.

* * * *

[OFFER AND OBJECTION TO PLAINTIFF'S EXHIBIT 1]

[T. Vol. II, p. 41]

MR. NOTTINGHAM: Your Honor, at this time I am going to tender a document which has been marked Plaintiff's Exhibit 1 which purports to be the testimony of Robert Dwight Dunn before the Federal Grand Jury, and bears the certificate at the end of that testimony of Terri L. Bryant, Special Court Reporter of the Grand Jury of the United States.

THE COURT: Is that the totality?

MR. NOTTINGHAM: It is the totality of Mr. Dunn's grand jury testimony, Your Honor, and I would offer that at this time, based on the certificate of Terri Bryant.

THE COURT: Mr. Sears, your position, please?

MR. SEARS: May I have just a moment, please?

THE COURT: Please.

MR. SEARS: Your Honor, with regard to the authenticity of the document, the defense has no specific objection. We do object to the admission of the document on the ground, again, of the immunity order tendered to the Court, and on Mr. Dunn's fifth amendment grounds.

THE COURT: The Court will note the objection. The objection will be overruled on that basis, please.

* * * *

[STIPULATION TO DEFENDANT'S EXHIBITS F-1 AND F-2]

[T. Vol. II, p. 42]

MR. SEARS: Your Honor, might I also ask, without the necessity of calling Miss Bryant, whether the Government would be willing to stipulate that Defendant's Exhibits F-1 and F-2 that were tendered to the Court were entered by Judge Arraj prior to the grand jury proceedings, in other words, directly related to the grand jury proceedings.

MR. NOTTINGHAM: Without waiving my prior objection, I would so stipulate.

THE COURT: The record will so reflect.

Ladies and gentlemen, when the attorneys stipulate as to a matter, you may consider that evidence in the case. Do you understand that, please?

The stipulation is, as I understand, that the immunity was entered by Chief Judge Arraj prior to the time of the presentation of testimony.

MR. NOTTINGHAM: So stipulated.

MR. SEARS: That's correct.

* * * *

[T. Vol. II, p. 43-44]

DIRECT EXAMINATION OF ROD SNOW,

called as a witness by the plaintiff, being first duly sworn on his oath, testified as follows:

THE COURT: What is your name, please?

THE WITNESS: Rod Snow.

THE COURT: Your profession, please?

THE WITNESS: I am employed in the U.S. Attorney's office.

THE COURT: You are an attorney by profession, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Are you employed by any agency, please?

THE WITNESS: Yes, sir, by the U.S. Attorney's office, here in Denver.

THE COURT: Your title?

THE WITNESS: I am Assistant United States Attorney.

THE COURT: In brief, what are your duties in that regard, please, that related to trials or activities with the grand jury?

THE WITNESS: I am currently assigned to the criminal area of law, and I participate with the grand jury in investigating crime, and also in prosecuting indictments that are returned by the grand jury.

THE COURT: Proceed, please.

DIRECT EXAMINATION

BY MR. NOTTINGHAM:

Q Mr. Snow, how long have you been employed as an Assistant United States Attorney?

A About a year and a quarter.

Q Would you describe what your connection was with the case of United States v. Musgrave?

A Yes, sir. I participated with the agents in investigating the case, in presenting certain matters to the grand jury, and in prosecuting after the indictment was returned.

Q All right. Have you had an opportunity to review the grand jury transcript?

A You mean today?

Q Not today, but did you have an opportunity to review the grand jury transcript after it was made?

A Yes.

Q I will hand you what's been marked as Exhibit 1, Plaintiff's Exhibit 1, and ask you to identify that.

A It appears to be the transcript of one of the hearings from a witness that I presented to the grand jury.

* * * *

CROSS EXAMINATION OF ROD SNOW

[T. Vol. II, p. 64-65]

Q Were you present when a representation was made at that time by you and/or Mr. Hollingshead that you could in large part corroborate all of Mr. Dunn's testimony before the Federal Grand Jury?

A Yes.

Q Do you still believe that today but for Mr. Dunn's statements to the contrary?

A Could I do it today or could I have done it then?

Q Do you have any knowledge that would tend to refute Mr. Dunn's testimony before the Federal Grand Jury, other than the statements made by him personally?

A No.

Q All right. Now, with regard to Mr. Musgrave smuggling speed into the penitentiary, did your investigation present you with independent evidence that Mr. Musgrave was in fact smuggling speed into the penitentiary?

A There was testimony, other testimony by other people, to that effect, yes, sir.

* * * *

[T. Vol. II, p. 66-67]

Q (By Mr. Sears) Were you aware of an incident where Kate Blehm was detected smuggling what was believed to be speed in to Mr. Musgrave, and she thereby lost her visiting privileges?

A Yes. I knew she lost her visiting privileges.

* * * *

Q (By Mr. Sears) Mr. Snow, in your investigation, did you have independent corroborative information indicating that the Strammels were involved in smuggling speed into the penitentiary to Mr. Musgrave?

A Yes, sir.

Q Did you also have independent evidence that Mr. Dunn had been detected at the Colorado State Penitentiary for concealing some speed in his rectum, which was subsequently detected by a Dr. Doanes at the Colorado State Penitentiary?

A I don't recall anything about Dr. Doanes detecting it.

Q Were you aware of the incident where Mr. Dunn was detected with having speed detected or concealed in his rectum at the Colorado State Penitentiary, regardless of whether it concerned Dr. Doanes or not?

MR. NOTTINGHAM: Your Honor, may counsel approach the bench?

THE COURT: Let's go ahead, please.

A I don't recall that.

* * * *

[T. Vol. II, p. 68-70]

Q Was Mr. Dunn, based on your investigation, a gofer for Mr. Musgrave?

A Was Mr. Dunn?

Q Yes.

A Yes.

Q Did you have other evidence independently corroborating that?

A No.

Q Other than Mr. Dunn's statement, did you have other evidence refuting that?

A No.

Q All right. Mr. Snow, I believe in your overt acts you allege that a great number of phone calls were placed from the phone numbers 881-2273 at the Rustic Resort and 881-2278 in Belleview.

Did you have occasion to confirm with the telephone company or Mountain Bell, as to whom those two numbers listed?

A As to whom the two telephone numbers were listed?

Q Yes.

A Yes, I'm sure.

Q And as you alleged in the indictment and as Mr. Dunn testified before the Federal Grand Jury, isn't it a fact that your independent investigation with Mountain Bell indicated that 881-2273 listed to the Rustic Resort and that 881-2278 in fact listed to Katherine or Kate Blehm?

A I don't remember the specific telephone number, but it did confirm that they did list to whom they were told they were listed to.

Q And your investigation did confirm that Kate or Katherine Blehm was the girlfriend of Phillip Musgrave?

A Yes, sir.

Q Did your investigation confirm whether or not Robert Dunn, at the time of Mr. Dunn's testimony before the Federal Grand Jury, was in fact living on West 58th Avenue in Arvada, to your recollection?

A Did I confirm where he lived when he testified before the grand jury?

Q You or the Drug Enforcement Administration transmitting such information to you in the course of the preparation of the case.

A I presume we did confirm it. I don't have an independent recollection as to the address.

* * * *

[T. Vol. II, p. 70-71]

Q (By Mr. Sears) Mr. Perkins never specifically denied that he delivered drugs to Robert Dunn from Phillip Musgrave in November or December of 1975?

A Mr. Perkins, to me, in a one-on-one confrontation, no.

Q The basis of, by virtue of his not guilty plea, that plea was with regard to the conspiracy charge, and all the overt acts charged to him, that was the not guilty plea entered, was it not?

A Yes, sir.

Q And that dealt with much more than simply a delivery to Mr. Dunn in November or December of 1975?

A Yes, sir.

Q Mr. Snow, you had occasion to review the statement to Michael Canges on September 30, 1976?

A This morning or when I was given it last fall or—

Q You have reviewed it?

A I know the contents of this document, yes, the general content.

Q Mr. Snow, at page 29 of what has been marked, I believe, as Plaintiff's Exhibit 2, is there a statement

there made to the effect that Phillip Musgrave never gave me any drugs at any time?

A Yes, sir.

Q Through the course of your investigation—we are talking about the statement to Mr. Canges.

A Yes, sir.

Q Through the course of your investigation, did you have information that refuted that statement?

A Testimony from Mr. Dunn, yes.

Q Any other independent evidence, to your recollection?

A Mr. Dunn was the sole source of that area of testimony, as I recall.

* * * *

[OBJECTION TO GOVERNMENT EXHIBIT 4-a]

[T. Vol. II, p. 80-81]

MR. NOTTINGHAM: This is a transcript of certain proceedings before Judge Winner on October 21, 1976.

THE COURT: Let's have this marked as an exhibit, so that we are all talking about the same document. Will you do that, please.

What is your position, Mr. Nottingham, please?

MR. NOTTINGHAM: Your Honor, I haven't had an opportunity to go through and excerpt the irrelevant portions of this transcript. Again, I would submit that this transcript is admissible as it bears—

THE COURT: I am sure that counsel is not questioning the authenticity.

MR. SEARS: No.

THE COURT: That's correct. Let's go. There is a proper certification. Let's have a marshal in here, please. Let's have a marshal throughout the trial, would you, please.

You are tendering part of this transcript, is that correct, please?

MR. NOTTINGHAM: That's correct.

THE COURT: All right. Let's go ahead. Any objections? If there are, state them, please.

MR. SEARS: Yes, I do, Your Honor. First of all, any of the statements or declarations made by Mr. Dunn in that proceeding are not charged in this indictment, and I submit they are immaterial and irrelevant.

* * * *

[MOTION FOR JUDGMENT OF ACQUITTAL]

[T. Vol. II, p. 96-98]

Second of all, Your Honor, I would move for judgment of acquittal on this case due to the fact that as defendant's exhibits tendered before this Court—I don't recall the specific marking—but the motion for order of immunity and order of immunity indicate that the testimony of Robert Dunn before the Federal Grand Jury cannot be used to establish a corpus delicti in an inconsistent declarations case.

I specifically cite to the Court the case of *United States* v. *Patrick*, 542 F.2d 381, a Seventh Circuit 1976 case, that said specifically that in an inconsistent declarations case immunized testimony in a grand jury proceeding, testimony granted pursuant to 18 United States Code, Sections 6002 to 6003, and any subsequent statements made pursuant to an order of immunity—in that case, there were three separate immunity orders, three separate proceedings before the Federal District Court—inconsistent declarations cannot be used when the testimony results from immunized testimony in an inconsistent declarations case.

The Court in *Patrick* holds that 6002 and 6003 simply does not encompass inconsistent declarations prosecution, only where the prosecution is under subsection (a) of 1623 or 1621 it would be warranted. And I tender to the Court a trial brief on that matter.

I secondly move for judgment of acquittal on the basis that there is no inconsistent declaration in a proceeding ancillary or before any Federal District Court or Federal Grand Jury, in the statement to Attorney Canges. Mr. Cohen stated very specifically that he did not comply with the Federal Deposition Rules in a criminal proceeding, it was merely a statement, and on the face of Plaintiff's Exhibit 2 it shows that Jerald Cohen is a

reporter for the State and District of Colorado. There is no indication that he was sworn as a reporter for the Federal District Court in the District of Colorado, there is no indication that he meets the standards set by the Judicial Conference as promulgated in the statutes I cited to you before, and I think most telling was Mr. Nottingham's statement that this was a private proceeding before an attorney.

If the Court goes this far to extend an inconsistent declarations case to cover any private statement given to any attorney privately, I submit that is beyond the intent and the spirit of 1623, inconsistent declarations prosecutions.

I would also tender a written brief, a motion for judgment of acquittal, and there is simply not a proceeding based on the Canges statement and a proceeding ancillary to or before any Federal Court or grand jury.

Let the record show that I am tendering copies of the motion and brief to the prosecuting attorney.

* * * *

[OBJECTIONS TO GOVERNMENT'S EXHIBITS 1-a, 2-a AND 4-a]

[T. Vol. II, p. 113-114]

THE COURT: The Court will deny the motion, renewed motions for judgment of acquittal. The Court at this time will note the objection of Mr. Sears to the Court's admitting in evidence the following exhibits, to-wit: 1-A, which is an excerpt from the testimony of Mr. Dunn before the grand jury; 4-A, which are excerpts from the proceedings before Chief Judge Winner.

What is the number of the so-called affidavit before Mr. Cohen?

Mr. Sears, I will note your objections to 1-A, 4-A, 2-A. Your objection will be noted and overruled. The Court intends to submit these documents to the jury.

MR. NOTTINGHAM: Your Honor, excuse me. For the record, may we also note that the Government's theory of this case is relying on 18 United States Code, Section 1623 (c), and that the Government intends to present its case on the basis of inconsistent declarations in proceedings ancillary to a U. S. Court or a Federal Grand Jury proceeding.

THE COURT: Do I understand that you are proceeding, Mr. Nottingham, on the provisions of the statute, 1623 (c).

MR. NOTTINGHAM: That is the theory of our proof, Your Honor, yes, sir.

THE COURT: This is the theory of your case, is that correct?

MR. NOTTINGHAM: That's correct. We are proving our case as permitted by 1623 (c).

* * * *

[EXCERPT FROM PLAINTIFF'S CLOSING ARGUMENT]

[T. Vol. II, p. 168]

You will be instructed, and I would like to quote this, and ask you to listen carefully for this instruction. You will be instructed in part, that it is not necessary for the evidence to show which of the declarations in each count was in fact false.

The only necessity is that the statement under oath be irreconcilably contradictory, that is, irreconcilably contradictory declarations. So, we don't have to try to prove that his grand jury testimony was false, but whether his subsequent affidavit to the defense attorney was false. That's all that mass of testimony would go to, is which one is really true. We don't have to prove that. All we have to prove is the inconsistent statements.

* * * *

[EXCERPT FROM TRIAL COURT'S INSTRUCTIONS]

[T. Vol. II, p. 178-179]

As the Court has read to you, ladies and gentlemen, the statute or federal law that is referred to in the indictment is Title 18, United States Code, Section 1623, and it provides in part that whoever under oath in any

proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration, shall be guilty of an offense.

There are five essential elements required to be proved in order to establish each of the counts charged in the indictment. I would like to outline these for you, ladies and gentlemen.

First, the defendant had made two or more declarations which are inconsistent to the degree that one of them is necessarily false.

Second, said declarations were given in proceedings before or ancillary to a court or grand jury of the United States.

Third, said declarations were made under oath.

Fourth, said declarations were known by the defendant to be falsely inconsistent when made.

Fifth, that testimony in each proceeding must be material to the crime charged or under investigation.

These are the five elements, do you understand that, ladies and gentlemen?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

[Title Omitted in Printing]

MOTION FOR JUDGMENT OF ACQUITTAL—
Filed April 13, 1977

The indictment in the above case charges the defendant with five (5) counts of making false declarations before a grand jury or court in violation of 18 United States Code, Section 1623 (as amended, 1970). More specifically, in paragraph 6 of each count, the indictment alleges, in part, that "[t]he aforesaid declarations by Robert Dunn . . . were inconsistent to the degree that one of said declarations was false and known by him to be false when made."

Title 18, United States Code, Section 1623 provides, in part, as follows:

> "Whoever under oath in any proceeding *before or ancillary to any court or grand jury of the United States* knowingly makes any false material declaration . . ."

shall be guilty of an offense against the United States. Title 18, United States Code, Section 1623(a) (as amended, 1970).

Title 18, U.S.C. § 1623(c) provides, in part, as follows:

> "An indictment or information for violation of this section alleging that, *in any proceedings before or ancillary to any court or grand jury of the United States*, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false . . ." Title 18, United States Code, Section 1623(c) (as amended, 1970) (Emphasis added.)

ARGUMENT

THE SWORN STATEMENT BEFORE JERALD B. COHEN ON SEPTEMBER 30, 1976, DOES NOT QUALIFY AS A "PROCEEDINGS BEFORE OR ANCILLARY TO ANY COURT OR GRAND JURY OF THE UNITED STATES."

Title 18 U.S.C. § 1623(c) requires that the inconsistent declarations be made under oath "in any proceedings *before or ancillary to any court or grand jury of the United States* . . ." Title 18, United States Code, Section 1623(c) (as amended, 1970) (Emphasis added.)

The legislative history to 18 U.S.C. § 1623(c) indicates an intent by Congress "to facilitate Federal perjury prosecutions and establish a new false declaration provision applicable in *Federal grand jury and court proceedings.*" *U.S. Code Cong. and Adm. News*, 1970 Session, Vol. II, p. 4008 (Emphasis added.)

A plain reading of the statute and the legislative history indicates no intent to extend inconsistent declarations prosecutions to statements or declarations made in proceedings other than before or ancillary to federal grand jury or court proceedings.

A sworn affidavit taken in a private attorney's office by a shorthand reporter who is a "Notary Public within and for the State of Colorado" simply does not qualify. (See Affidavit of Robert Dwight Dunn, September 30, 1976, p. 2). Mr. Cohen may be a "certified shorthand reporter" within the definition of C.R.S. 1973 § 12-63-102; but unless he has been sworn and qualifies pursuant to Title 28, United States Code, § 753, he is not a reporter for the United States District Court for the District of Colorado. See *United States* v. *Doshen*, 133 F.2d 757 (3rd Cir. 1943).

Notwithstanding, the mere taking of a sworn statement is not a proceedings before or ancillary to any court or grand jury of the United States. In 1970, Congress created a procedure for taking depositions in criminal cases in federal courts. 18 U.S.C. § 3503. If such a procedure had been followed, a deposition might qualify.

See *U.S. Code Cong. and Adm. News*, 1970 Session, Vol. II, p. 4009; *United States* v. *King*, —— F.2d ——, 20 Cr.L.Rptr., 2348 (9th Cir. December 16, 1976).

To gain some idea as to a definition of what "proceedings before or ancillary to a court or grand jury of the United States" are, we may look to 18 U.S.C. § 6002. Since it is not defined in § 1623 but is closely related to immunity proceedings under §§ 6002-6003, the same definitions may assumedly apply. The same phraseology is used in both sections.

Title 18 U.S.C. § 6001(4) defines "court of the United States" as follows:

> "'Court of the United States' means any of the following courts: the Supreme Court of the United States, a United States court of appeals, a United States district court established under chapter 5, title 28, United States Code, the District of Columbia Court of Appeals, the Superior Court of the District of Columbia, the District Court of Guam, the District Court of the Virgin Islands, the United States Court of Claims, the United States Court of Customs and Patent Appeals, the Tax Court of the United States, the Customs Court, and the Court of Military Appeals."

Though there does not appear to be any provision in the federal statutes defining "grand jury of the United States," the provisions concerning the impaneling of a grand jury, 18 U.S.C. § 3321, whether it be a regular statutory grand jury or a special grand jury, 18 U.S.C. § 3331 *et seq.*, seems to make clear that such a body is a creature of the federal district court in the judicial district in which such body sits. See Rule 6, *Federal Rules of Criminal Procedure.* The scope of a grand jury's duties is set out in 18 U.S.C. § 3332.

We must next determine what proceedings would be considered "ancillary to" a court or grand jury of the United States. The common definition of "ancillary" is found to be subordinate, subsidiary, auxillary, supplementary. *Webster's Third New Instructional Dictionary*, 1971. The only federal decision found defining the term

adopts the meanings "auxillary" or "subordinate." *Johnson* v. *Thomas*, 16 F.Supp. 1019 (N.D. Tex. 1936).

The defendant contends that an individual act by an attorney calling a witness in to swear to an affidavit cannot be considered to be a "proceeding before or ancillary to a court or grand jury of the United States." Penal statutes are to be strictly construed. *Bronston* v. *United States*, 409 U.S. 352 93 S.Ct. 595, 34 L.Ed.2d 568 (1973). Such an interpretation, the defendant submits, is overbroad.

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT DUNN, DEFENDANT

TRIAL BRIEF—Filed April 13, 1977

The indictment in the above case charges the defendant with five (5) counts of making false declarations before a grand jury or court in violation of 18 United States Code, Section 1623 (as amended, 1970). More specifically, in paragraph 6 of each count, the indictment alleges, in part, that "[t]he aforesaid declarations by Robert Dunn . . . were inconsistent to the degree that one of said declarations was false and known by him to be false when made."

Title 18, United States Code, Section 1623 provides, in part, as follows:

> "Whoever under oath in any proceeding *before or ancillary to any court or grand jury of the United States* knowingly makes any false material declaration . . ."

shall be guilty of an offense against the United States. Title 18, United States Code, Section 1623(a) (as amended, 1970).

Title 18, U.S.C. § 1623(c) provides, in part, as follows:

> "An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are *inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false* . . ." Title 18, United States Code, Section 1623(c) (as amended, 1970) (Emphasis added.)

ARGUMENT

THE DEFENDANT'S IMMUNIZED TESTIMONY BEFORE THE FEDERAL GRAND JURY CANNOT BE USED AGAINST HIM IN AN INCONSISTENT DECLARATIONS PROSECUTION.

Paragraph one of each count of the indictment in the present case alleges that "[o]n June 16, 1976, at Denver, in the District of Colorado, Robert Dunn, while under oath as a witness in a proceeding before a Grand Jury of the United States in the District of Colorado, did knowingly make a false material declaration, as more fully set forth in paragraphs 2 through 6 of this Count . . ." Accordingly, paragraph 4 of each count alleges "[a]t the time and place aforesaid, Robert Dunn, while under oath, did knowingly declare before the Grand Jury with respect to the aforesaid material matter as follows . . ." and proceeds to allege specific declarations made before the Grand Jury.

In paragraph 6 of each count, the indictment alleges that "[t]he aforesaid declarations by Robert Dunn, as set forth in paragraphs four (4) and five (5) of this Count — were inconsistent to the degree that one of said declarations was false and known by him to be false when made." It is therefore quite clear that the declarations made by the defendant before the Federal Grand Jury sitting at Denver, Colorado, on June 16, 1976, are relied upon by the government, in part, to make out its case of inconsistent false declaration under 18 U.S.C. § 1623(c).

Evidence has been introduced to show that the defendant, Robert Dwight Dunn, was called to testify before said grand jury on June 16, 1976, by the U.S. Government. The defendant, having been sworn, stated his name and was thereupon advised of his right to remain silent and his right to counsel. Immediately thereafter, government counsel asked the defendant about his knowledge and activities with Phillip Musgrave to which the defendant responded by claiming his privilege against self-incrimination. The defendant was thereupon taken

before the Honorable Alfred A. Arraj and, upon presentation of an application for immunity under 18 U.S.C. §§ 6002 and 6003 by the United States, an order of use immunity was entered.

Title 18, United States Code, Section 6002 provides as follows:

> "Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but *no testimony or other information compelled under the order* (or any information directly or indirectly derived from such testimony or other information) *may be used against the witness in any criminal case*, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. (Emphasis added.)

Though immunity granted under §§ 6002-6003 is use immunity, as compared to the former transactional immunity, *Tierney* v. *United States*, 409 U.S. 1232, 93 S.Ct. 17, 34 L.Ed.2d 37 (1972); *Kastigar* v. *United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972), use immunity is co-extensive with the Fifth Amendment privilege and must be asserted in any criminal proceedings brought against a defendant based upon or derived from the immunized testimony. *United States* v. *Cappetto*, 502 F.2d 1351 (7th Cir. 1974) *cert. den.*, 420 U.S. 925; *Goldberg* v. *United States*, 472 F.2d 513 (2nd Cir. 1973).

Title 18 U.S.C. § 6002 protects a witness from use of the immunized testimony against him in any criminal

case, "*except* a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002 (Emphasis added.) The immunized testimony, however, *cannot* be used as a basis for an inconsistent declarations prosecution under 18 U.S.C. § 1623(c).

The distinguishing feature of a § 1623(c) prosecution from a § 1623(a) or § 1621 prosecution is that the government, in the former, need not prove the falsity of any allegedly inconsistent declarations. It need only demonstrate that the defendant made two or more declarations under oath which were inconsistent to the degree that one of them is necessarily false. See footnote 3, *United States* v. *Patrick*, 542 F.2d 381, 384 (7th Cir. 1976).

Immunized testimony may *not* be used to establish the *corpus delicti* of an inconsistent declarations prosecution. *United States* v. *Patrick*, *supra*, at p. 385.

> "We believe such use was not intended by Congress to come within the exception found in 6002 that the compelled testimony may be used in 'a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.'" 542 F.2d at p. 385.

Many decisions similarly hold that a witness can't be compelled to testify before a federal grand jury under an order of immunity only to worry about inconsistent false declarations he may have made or will make under 18 U.S.C. § 1001. *United States* v. *Watkins*, 505 F.2d 545 (7th Cir. 1974); *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973); *United States* v. *Doe*, 361 F.Supp. 226 (E.D. Pa. 1973) *aff'd.* 485 F.2d 682 (3rd Cir. 1973) *cert. den.*, 415 U.S. 989. It is generally agreed that it is perjury committed in contravention of the immunity order that is expected for use. *United States* v. *Tramunti*, 500 F.2d 1334, 1342-44 (2nd Cir. 1974); *United States* v. *Patrick*, *supra* at p. 385.

> "To interpret this perjury exception to include a prosecution under § 1623(c) for inconsistent statements, *some* of which were made prior to the latest grant of immunity, would be too broad of a reading of § 6002." 542 F.2d at p. 385.

A similar holding was entered in *People* v. *Denson*, 59 Ill.2d 546, 322 N.E.2d 464 (1975). Dunn was not ordered by Judge Arraj to testify truthfully before Attorney Canges. The immunity order applied only to the grand jury proceedings.

Even if the government establishes that the inconsistent statement made before a court or grand jury *was false when made*, this will still not save a prosecution under 18 U.S.C. § 1623(c). See *United States* v. *Bell*, 371 F.Supp. 220, 224 (E.D. Tex. 1973).

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 76-CR-322

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ROBERT DUNN, DEFENDANT

REPLY BRIEF—Filed May 19, 1977

ARGUMENT

I

IMMUNIZED TESTIMONY MAY NOT BE USED TO ESTABLISH THE *CORPUS DELICTI* IN AN INCONSISTENT DECLARATIONS PROSECUTION.

United States v. *Patrick*, 542 F.2d 381 (7th Cir. 1976) very clearly holds that testimony immunized under 18 U.S.C. §§ 6002-6003 may not be used to establish the *corpus delicti* in an inconsistent declarations prosecution under 18 U.S.C. § 1623(c). The defendant submits that the only way that such immunized testimony can be used is if the government attempts to establish that the defendant perjured himself before the grand jury *in violation of the order of immunity*. But when the government committed itself to an inconsistent declarations theory not proving which of the two declarations was false (the Canges statement or the grand jury testimony), then the *Patrick* holding becomes very significant.

II

THE CANGES STATEMENT WAS NOT A PROCEEDING BEFORE OR ANCILLARY TO A COURT OR GRAND JURY OF THE UNITED STATES.

The defendant stands on the authorities and argument submitted in its Trial Brief with the further statement that, contrary to the government's assertion, defendant does *not* concede that a deposition is a proceeding with the provisions of § 1623(c). The defendant submits a deposition complying with 18 U.S.C. § 3503 would have presented a much closer question. But certainly a recorded statement taken in an attorney's office does not qualify under the statute.

Respectfully submitted,

/s/ Daniel J. Sears
DANIEL J. SEARS
Federal Public Defender

[Certificate of Service (Omitted in Printing)]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 77-1398

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROBERT DUNN, DEFENDANT-APPELLANT

FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

(D.C. No. 76-CR-322)

OPINION—June 5, 1978

Daniel J. Sears, Federal Public Defender, for appellant.

Edward F. Nottingham, Asst. U. S. Attorney, (with Joseph F. Dolan, U. S. Attorney, on the brief) for appellee.

Before BARRETT, DOYLE, LOGAN, Circuit Judges

BARRETT, Circuit Judge

Robert Dunn appeals from his conviction of making false statements before a grand jury in violation of 18 U.S.C. § 1623.

FACTUAL BACKGROUND:

In June 1976, under a grant of immunity pursuant to 18 U.S.C. § 6002, Dunn presented testimony to a grand jury investigating illegal drug activity in the Colorado State Penitentiary. Dunn's testimony implicated Phillip Musgrave in the crimes under investigation. Following the grand jury proceeding, Musgrave and others were indicted on charges of conspiring to manufacture and distribute controlled substances. (United States v. Musgrave, et al, No. 76-Cr-155.)

Subsequently, in September 1976, Dunn appeared in the office of Michael Canges, attorney for Phillip Musgrave. In the presence of Canges and Gerald Cohen, a notary public, Dunn gave an oral statement under oath which was recorded and transcribed wherein he recanted his grand jury testimony implicating Musgrave. (Vol. I at 74-83; Vol. II at 144-147). Dunn stated that much of what he had previously told the grand jury was not true. (Vol. I at 68-73). At the time Dunn made the statement, he was not represented by counsel. However, there is nothing in the record which indicates that Dunn could not have appeared with counsel or that his statement was not completely voluntary. Dunn was fully cognizant that Canges was representing Musgrave.

Thereafter, Michael Canges notified the United States Attorneys' office of Dunn's recantation of his grand jury testimony. Canges filed a transcript of Dunn's sworn statement with the district court wherein the *Musgrave* prosecution was pending. Motions were filed on behalf of Musgrave and others challenging the indictments on the basis that such indictments had been returned predicated on false grand jury testimony. An evidentiary hearing on these motions was held before Judge Winner in October 1976. At that time Dunn, who was then represented by counsel, reaffirmed under oath that he had lied to the grand jury. His testimony of course, was duly reported and transcribed. As a result, the charges against Musgrave were subsequently reduced.

Thereafter, Dunn was indicted and charged with five counts of making false statements to a grand jury in violation of 18 U.S.C. § 1623. The evidence against Dunn

admitted at trial included: Dunn's grand jury testimony, Dunn's Canges statement, and relevant portions of Dunn's testimony at the Musgrave motion hearing. At Dunn's trial, testimony was given by the notary public who had administered the oath to Dunn in Canges' office, and by the United States Attorney in charge of the grand jury proceeding. The jury found Dunn guilty on three counts of perjury before the grand jury.

On appeal Dunn contends that the trial court erred in 1) ruling that the proceeding in Canges' office was a proceeding ancillary to a court or grand jury of the United States, and 2) ruling that immunized grand jury testimony could be used to establish the *corpus delecti* in an inconsistent declarations prosecution.

PRELIMINARY DISCUSSION:

Before proceeding to the specific issues at hand, it is necessary to discuss in some detail the pertinent statutes and the indictment as drafted against Dunn, as such have a significant bearing upon the specific issues raised on appeal.

18 U.S.C. § 1623, captioned "False Declarations Before a Grand Jury or Court" provides that:

> "(a) Whoever under oath in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information . . . knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. § 1623(c), outlines a statutory method of charging a witness with violating § 1623(a):

> "(c) An indictment or information for violation of this section alleging that in any proceeding before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false *need not specify which declaration is false* . . ."

In addition, § 1623(c) sets forth a method for proving false declarations:

> "In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury."

Thus, § 2623(c) eliminates the two witness rule which is otherwise required to prove perjury. The government need not prove which of the declarations was false through extrinsic evidence, but rather, the falsity of one of the two declarations is inferred from their inconsistency with each other. United States v. Slawik, 548 F.2d 75 (3rd Cir. 1977); United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), cert. denied 430 U.S. 931.

Turning now to the government's indictment of Dunn, all counts of the indictment read that:

> "On June 16, 1976, at Denver in the District of Colorado, ROBERT DUNN, while under oath as a witness in a proceeding before a grand jury of the United States in the District of Colorado, did knowingly make a false material declaration . . . in violation of Title 18, U.S.C. § 1623."

The indictment quotes the appropriate portions of Dunn's initial grand jury testimony from a certified transcript wherein Dunn made statements implicating Musgrave. The indictment also quotes statements contradicting Dunn's grand jury testimony made in Canges' office. The concluding portion of each count against Dunn included this language:

> "6. The aforesaid declarations by ROBERT DUNN, as set forth in paragraphs (4) and (5) of this count were inconsistent to the degree that one of said declarations was false and known by him to be false when made."

In the preliminary stages of the proceedings below, Dunn moved for a bill of particulars to determine which

statements the government intended to prove were false. The need for clarification is obvious. As quoted above, each count of the indictment specified that during Dunn's appearance before the grand jury in June, 1976 he knowingly made false material declarations. On the other hand, the concluding portion of each count indicated that the government was relying on 18 U.S.C. § 1623(c), where, as explained above, inconsistencies between Dunn's grand jury testimony and Dunn's Canges statement would be sufficient to prove the falsity of one or the other of them.

In response to Dunn's request for a bill of particulars, the government claimed to rely upon § 1623(c). The government and Dunn proceeded upon this theory of the case. For example, Dunn's counsel properly concluded that evidence to show that Dunn's June grand jury testimony was in fact true would be irrelevant in a § 1623 (c) prosecution. (Vol. II at 87, 113-114, 127-128, 153, 168). Of course, if the government had not chosen to proceed upon the inconsistent declarations theory, the government would have had to state which statements it intended to prove false, and Dunn's defense would have been to demonstrate that in fact such specified testimony was true. In addition, the jury was properly instructed that under 1623(c) the jury need not find which of the statements, that is, Dunn's June grand jury testimony or Dunn's Canges statement, was false, but rather that the jury need only find that the statements were so inconsistent that one had to be false. (Vol. II at 179).

CANGES' STATEMENT

Dunn's first argument is that the proceedings in Canges' office did not constitute a proceeding ancillary to a grand jury or court proceeding so as to come within the meaning of § 1623(a) and (c).

The term "ancillary proceeding" has seldom been construed. Nor has the question of what other statement may be used to show inconsistency with grand jury testimony. "Ancillary proceeding" is generally defined as "one subordinate to or in aid of another primary action". Black's Law Dictionary (4th Ed. 1968) at 112.

In the absence of a clear meaning for the term "ancillary proceeding", Dunn argues that his statement made in Canges' office was not taken in a proceeding before or ancillary to the grand jury. He argues that Gerald Cohen was not an officer for the United States District Court for the District of Colorado such that a statement taken by him could be ancillary to the federal court proceedings in *United States* v. *Musgrave*, and stresses that he was not advised of his rights nor was counsel present. Dunn analogizes to 18 U.S.C. § 3503, which provides the method for taking depositions of unavailable witnesses, and implies that procedures more closely adherent to those outlined in § 3503 may be found to be ancillary to a grand jury proceeding.

On the other hand, the government submits that Dunn's affidavit in Canges' office was taken in a proceeding ancillary to the grand jury proceeding, where the testimony was given under oath, administered by a notary public authorized to do so, where the testimony was taken in the office of an attorney of a defendant in a federal court proceeding, and where the affidavit was filed in that court proceeding and influenced the outcome of that proceeding.

This court has concluded that while the Canges statement is "ancillary", in the sense that it is connected to and had an effect upon the grand jury proceeding, the event occurring in Canges' office, in and of itself, is not a "proceeding" within the meaning of the statute so as to be a proceeding ancillary to a grand jury proceeding. Despite the administration of the oath and presence of the notary public, we hold that the event lacks the degree of formality the statute requires.

The court further concludes that Dunn's subsequent affirmation of his Canges statement, in the course of the hearing conducted in the district court on Musgrave's motion to dismiss the indictment, clearly constitutes a proceeding ancillary to the grand jury proceeding. Thus, the admission into evidence of Dunn's testimony during the hearing on Musgrave's motion was proper in that it constituted an affirmation and adoption of the Canges statement, supportive thereof and cumulative in nature.

Furthermore, the admission into evidence of Dunn's testimony given at the Musgrave hearing does not create a fatal variance between proof at trial and the indictment. This court has consistently held that a variance between the indictment and evidence is not fatal unless the defendant could not have anticipated from the indictment what evidence would be presented at trial or unless the conviction based on an indictment would not bar a subsequent prosecution. United States v. Cowley, 452 F.2d 243 (10th Cir. 1971); United States v. Freeman, 514 F.2d 1184 (10th Cir. 1975). Clearly, where Dunn's testimony in the Musgrave motion hearing was inextricably related to his Canges statement, that is, affirming the truth of the latter, it cannot be said that Dunn could not have anticipated that such evidence would be presented against him at his perjury trial.

Finally, the court has also considered whether the indictment brought against Dunn meets the standards for sufficiency of an indictment as set forth in United States v. Radetsky, 535 F.2d 556 (10th Cir. 1976). The government has repeatedly stated its reliance upon § 1623 (c) in this case. Therefore, to state an offense under that statute, the government had to allege inconsistent statements by Dunn made in one or more proceedings ancillary to a grand jury or court. In the indictment the government pleaded Dunn's grand jury testimony and Dunn's Canges statement, the latter of which we have determined is in and of itself not taken in a proceeding ancillary to the grand jury. While Dunn's testimony at the Musgrave hearing is clearly taken in a proceeding ancillary to the grand jury the government completely failed to plead such testimony in the indictment.

However, the sufficiency of an indictment is to be determined by practical rather than technical considerations, United States v. Crim, 527 F.2d 289 (10th Cir. 1976), cert. denied 425 U.S. 905. Viewed in this practical light, where excerpts from the Canges statement were necessarily included in the indictment to establish "inconsistency", and where the Canges statement was inextricably related to Dunn's testimony in the Musgrave

hearing which *was* taken in an ancillary proceeding, we hold that the indictment sufficiently states an offense under § 1623(c).

GRAND JURY TESTIMONY:

Having established by response to the bill of particulars that the government intended to prove a violation of § 1623(a) through the use of the method prescribed in § 1623(c), Dunn contends that immunized grand jury testimony may not be used to establish the *corpus delecti* of a prosecution for inconsistent declarations without a prior showing of its falsity.

Prior to his testimony before the grand jury, Dunn was granted immunity in accord with 18 U.S.C. § 6002 which provides:

> No testimony or other information compelled under the order may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

It is hornbook law that testimony given by a witness under a grant of immunity cannot be used to incriminate him in crimes or activities concerning which he gives testimony. Kastigar v. United States, 406 U.S. 441 (1972). However, the grant of immunity is never a license to commit perjury. In United States v. Tramunti, 500 F.2d 1334, 1344 (2nd Cir. 1974), cert. denied 419 U.S. 1079, the court stated:

> "The immunity granted by the court does not confer upon the witness the right to perjure himself or withhold testimony. . . . The very purpose of the granting of immunity is to reach the truth and when that testimony is incriminating, it cannot be used against him. If the witness thwarts the inquiry by evasion or falsehood, as the appellant did here, such conduct is not entitled to immunity. In fact, another crime not existing when the immunity was offered is thereby committed. The immunity does not extend *in futuro*."

Neither the Fifth Amendment nor statutory immunity offers a witness protection against prosecution for perjury, United States v. Frumento, 552 F.2d 534 (3rd Cir. 1977). In United States v. Mandujano, 425 U.S. 564, 576 (1976), Chief Justice Burger, speaking for the court, described the sanctions available to the government when an immunized witness commits perjury:

> "On the other hand, when granted immunity, a witness once again owes the obligation imposed upon all citizens—the duty to give testimony—since immunity substitutes for the privilege.
>
> "In this constitutional process of securing a witness' testimony, perjury simply has no place whatever. Perjured testimony is an obvious and flagrant affront to the basic concepts of judicial proceedings. Effective restraints against this type of egregious offense are therefore imperative. The power of subpoena, broad as it is, and the power of contempt for refusing to answer, drastic as that is—and even the solemnity of the oath—cannot insure truthful answers. Hence, Congress has made the giving of false answers a criminal act punishable by several penalties; in no other way can criminal conduct be flushed into the open where the law can deal with it."

§ 1623 is a species of perjury. Its enactment was intended to facilitate perjury prosecutions and establish a new false declaration provision applicable to federal grand jury and court proceedings. United States v. Gross, 511 F.2d 910 (3rd Cir. 1975), cert. denied 423 U.S. 924; Organized Crime Control Act, Title IV, 1970 U.S. Code Cong. and Ad. News at 4007, 8.

We feel that Congress intended to include § 1623 false declarations prosecutions within the perjury exceptions to the immunity grant of § 6002. But see United States v. Berardelli, 565 F.2d 24, 29 (2nd Cir. 1977). Such interpretation is in the spirit of the perjury statutes, to insure against wrongs to the court and to meet the ends of justice. Bronston v. United States, 409 U.S. 352 (1973). We observe that it would be an affront to the basic purpose of the criminal justice system to permit one to avoid likely prosecution under the grant of immunity. The import of statements made in the context of a grand jury proceeding were recognized by the Supreme Court in United States v. Harris, 311 U.S. 292 (1940):

> Section 125 of the Criminal Code makes no distinction between the false assertions of the fact of prior statements and the false assertions of any other fact. Nor can we see any reason to make one. As the Government points out, the denial of the fact that certain statements have been made may be equally as clear, deliberate, and material a falsehood as the denial of any other fact. *And since statements made to government agents are generally one of the bases upon which criminal proceedings are instituted and indictments returned, such a distinction might substantially impede effective administration of criminal law.* (Emphasis supplied.)
> 311 U.S., at p. 295.

We have carefully studied the cases relied upon by Dunn, including United States v. Patrick, 542 F.2d 381 (7th Cir. 1976), *cert. denied*, 430 U.S. 931 (1977); United States v. Housand, 550 F.2d 818 (2nd Cir. 1977), *cert. denied*, 431 U.S. 970 (1977); and United States v. Berardelli, *supra*. These cases involve the interrelationship between § 6002 immunity, the Fifth Amendment, and § 1623(c) inconsistent declarations prosecutions. Arising in different factual contexts, these decisions basically stand for the general proposition that immunized testimony may not be used to establish the *corpus delecti* of an inconsistent declarations prosecution without a prior showing of falsity.

However, unlike the fact situations of the above decisions relied upon by Dunn, Dunn's subsequent testimony in his Canges affidavit and in the Musgrave motion hearing not only were inconsistent with his immunized grand jury testimony, but, significantly, *contained Dunn's admission that he had in fact testified falsely before the grand jury.* Even though we have held that the government need not prove which of Dunn's statements were false for purposes of sustaining his conviction under § 1623(a), (c), and while we do not decide whether,

under other circumstances, immunized testimony may be admitted to demonstrate inconsistency without a prior showing of falsity, in our view Dunn's unequivocal admission that his immunized testimony before the grand jury was false justified the use of such immunized testimony to establish the *corpus delecti* of the present prosecution.

Immunity statutes are, of course, ordinarily for the benefit of the government, designed to effectively serve the compelling needs of the criminal justice system by preventing a substantial avoidance of prosecution and penalty. Dunn has grossly abused those purposes. In Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963), the Supreme Court said, *inter alia*:

> . . . *Plainly the offer of immunity contained in the voluntary disclosure policy presupposed, at the very least, that a delinquent taxpayer would make a "clean breast of things"* . . . . [in] deciding whether to disclose or run the risk of prosecution petitioners were initially justified in relying on the Treasury's general offer of immunity . . . *once a fraudulent disclosure had been determined upon they must be deemed to have recognized that such an offer had in effect been withdrawn as to them or, amounting to the same thing, that they were no longer entitled to place reliance on it.* Petitioners are thus in legal effect left in no better position than they would have been had the treasury formally withdrawn its offer of immunity before their disclosure figures were furnished. (Emphasis supplied.)
> 371 U.S., at pp. 349, 350.

In the instant case, Dunn's recantation was, in an analogy to *Shotwell, supra*, an admission that he had not made a "clean breast of things" in his immunized testimony before the grand jury which implicated Musgrave. Thus, such false testimony stripped him of the cloak of immunity which he was initially entitled to rely upon. Dunn's recantation thus—as in *Shotwell*—in legal effect left him in no better position than he would have been in had the Government formally withdrawn its offer of immunity before he testified before the grand jury.

WE AFFIRM.

IN THE UNITED STATES TENTH CIRCUIT
COURT OF APPEALS
MAY TERM—June 22, 1978

Before The Honorable James E. Barrett, The Honorable William E. Doyle, and The Honorable James K. Logan, Circuit Judges

No. 77-1398

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

ROBERT DUNN, DEFENDANT-APPELLANT

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

SUPREME COURT OF THE UNITED STATES

No. 77-6949

ROBERT DUNN, PETITIONER

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO the United States Court of Appeals for the Tenth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

December 11, 1978

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